Supreme Court, U.S.
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No. 90-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHEVRON CORPORATION, et al.,
Petitioners,

vs.

STATE OF ARIZONA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents contend that the Court of Appeals' decision raises no questions that merit certiorari review.

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BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit.[1]

STATEMENT OF THE CASE

Procedural Background. Respondents, the States of Arizona, California, Oregon and Washington, filed their complaints in these actions between June 1975 and August 1977, alleging several violations of the Sherman Act, 15 U.S.C. § 1 *et seq.* The states alleged that the petitioner oil companies conspired: 1) to raise or stabilize prices for refined petroleum products, in part by engaging in a continual and mutual exchange of pricing and price-related information; 2) to create by various means an artificial scarcity of refined petroleum products in the western United

[1] *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* (9th Cir. 1990) 906 F.2d 432, *reversing* 656 F.Supp. 1296 (C.D. Cal. 1986).

States; and 3) to raise the price of petroleum products sold in bulk to public entities. App. A at 4a.[2]

Several years of extensive discovery culminated in January 1983 with the states filing a three volume pretrial brief with later supplements ("Plaintiffs' Initial Pretrial Brief" or "PIPB"), presenting certain evidence and analyzing what that evidence would prove. In July 1983, the oil companies moved for summary judgment, arguing that the evidence contained in PIPB failed to raise a triable issue of antitrust conspiracy. On November 25, 1986, the district court filed an opinion and order granting summary judgment and dismissing the cases. App. A at 4a-5a.

The appeals were argued on July 15, 1988, and the Court of Appeals rendered its decision and opinion on June 22, 1990. App. A at 3a. On January 8, 1991, the Court of Appeals denied the oil companies' petition for rehearing, and rejected the suggestion for a rehearing en banc. App. C at 99a. On February 7, 1991, the court denied petitioners' motion for a stay pending determination of this Petition.

The Record Before the Court of Appeals. Petitioners are major oil companies that, among other things, produce crude oil and manufacture it into gasoline and other refined products. These oil companies distribute refined products through: 1) franchised service station dealers selling one particular brand of gasoline and products; 2) company-owned and operated branded stations who sold in competition with all brands and franchised dealers; 3) independent "jobbers" or brokers who resold gasoline to various service stations and others who purchased in bulk; and 4) government and other entities who purchased under bulk sales contracts. App. A at 5a.

The franchised branded dealers could obtain their supplies of gasoline from only their particular franchisor. Each company sold gasoline to its franchised dealers at a price known as the "dealer tankwagon price." "In actuality, the official tankwagon prices

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[2] In this Opposition, citations to the decisions of the courts below will be made to the Appendix accompanying the Petition for Writ of Certiorari.

were only occasionally changed; fluctuations in the cost of gasoline to franchised dealers were more frequently reflected in changes to the applicable discounts from the tankwagon price. These discounts were variously known as 'temporary dealer assistance,' 'dealer aid,' or simply 'discounts.' " App. A at 5a.

By setting the applicable discount from the tankwagon price at which gasoline was supplied to branded dealers, the oil companies could determine the retail price of gasoline. The result of this market structure, in which franchised dealers were not free to shop for their supplies, was that each oil company was able to exercise effective control over the retail price at which its franchised dealers sold its gasoline. App. A at 6a. Thus, petitioners' activities coordinating dealer discounts from the tankwagon price were a means of raising and stabilizing the retail price of gasoline, as the states charged. App. A at 6a.

The record before the Court of Appeals included direct and circumstantial evidence. The states presented evidence that prices at petitioners' branded stations moved up in tandem. For years when gasoline "price wars" were part of the everyday vocabulary, retail prices declined over a period of weeks and then experienced especially steep increases, or "restorations." The court found that the sharp price increases resulted from virtually simultaneous oil company action withdrawing dealer discounts. App. A at 16a. This parallel pricing pattern, the court noted, was not accompanied by any proof of market concentration making the price cycle evidence, standing alone, proof of an antitrust violation. App. A at 21a.

The court then considered evidence of the oil companies' practice of disseminating tankwagon and retail prices. App. A at 23a. The oil companies publicized by various means changes in the tankwagon price and the amount of dealer discounts. App. A at 23a-33a. There was substantial testimony from oil company personnel that the purpose of publishing price changes, in some instances giving each other advance notice, was the hope that other companies would quickly match the price increases. App. A at 24a. The Court of Appeals found that in the oil companies' branded franchising system, in which the dealers were not free to shop around for supply, the publication of tankwagon prices

"served little purpose other than to facilitate interdependent or collusive price coordination." App. A at 29a.

There was substantial evidence that the oil companies had personal and telephone contacts about tankwagon prices and dealer discounts. App. A at 33a-45a. Moreover, there was *direct* evidence of oil company contacts with unbranded independent marketers for the purpose of coordinating price changes among major oil companies such as petitioners and independent marketers. App. A at 45a-54a. The oil companies' exchange of price information "was done with the purpose and effect of allowing greater coordination and stabilization of prices" and supported the inference of an agreement to stabilize prices. App. A at 38a, 39a, and 45a. The court held that the direct evidence of price coordination among major brands and independent marketers in itself created a genuine issue of material fact, and was not to be analyzed under rules concerning summary judgment on a record wholly composed of circumstantial evidence. App. A at 54a, n.22.

In the early 1970s the oil companies had identified a leading cause of the price war cycles as excess production. The companies' own documents recognized that eliminating "excess" production was a "good thought—how accomplish short of collusion." App. A at 55a. The oil companies agreed to exchange information about actual production levels, expected future demand, and projected supplies. App. A at 56a-59a. Petitioners proffered explanations that the ensuing shortages were real. In turn, the states offered proof that the oil companies deliberately chose not to expand capacity and took steps to reduce excess capacity to contrive a shortage. App. A at 58a-59a.

In this specific context that "[c]hanges in refinery capacity are not readily reversible," the Court of Appeals found that an agreement to exchange supply and demand forecasts facilitated "mutual decelerations of increases in production capacity." App. A at 61a. The court held that the combination of the oil companies' actions and intent, among other evidence concerning the states' contrived shortage allegations, supported the inference of conspiracy. App. A at 61a-62a and 65a.

The Court of Appeals' Opinion. The opinion that prompts this Petition resulted from a *de novo* review of a grant of summary judgment. Petitioners do not contend that the Court of Appeals was to undertake anything but a *de novo* review. The court applied this Court's *Matsushita* and *Monsanto* decisions[3] and their principles concerning the inferences to be drawn from circumstantial evidence. App. A at 7a-15a. Applying *Matsushita*, the court simply reviewed the record before it in the context of the markets from which the claims arose and the substantive principles that applied to each situation it analyzed. App. A at 10a-15a. The opinion does not in any manner question, let alone repudiate or purport to alter, this Court's *Matsushita* decision. App. A at 7a.

The opinion examines the entirety of the parties' contentions on summary judgment. The court reversed the summary judgment against the states and remanded the case for trial. App. A at 4a and 66a.

SUMMARY OF THE ARGUMENT

The questions that petitioners present do not occasion the exercise of certiorari. The Petition asks only that the Court compare the Court of Appeals' de novo review of a grant of summary judgment on a substantial and fact-specific record to the District Court's markedly different reading of and decision on the same record. In its extensive but not exhaustive review of the evidentiary record, the Court of Appeals found substantial factual support for each of the inferences of conspiracy that respondents requested be drawn in their favor to defeat summary judgment on three related antitrust charges.

The Court of Appeals carefully explained and rigorously honored the standards and principles for determining a motion for summary judgment that this Court announced in its *Monsanto* and *Matsushita* decisions. Nothing in the opinion below departs

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[3] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574; *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752.

from the Court's directions concerning the respective roles of direct and circumstantial evidence in summary judgment proceedings, the inferences that may be permissibly drawn from circumstantial evidence, and the jury's role in weighing permissible competing inferences. Petitioners do not, because they cannot, demonstrate that the opinion contradicts this Court's summary judgment rules or conflicts with other circuits' applications of those rules. Certiorari is not appropriate for Question 1.

The Petition's arguments that the Court of Appeals has allowed antitrust liability to be imposed for "mere conscious parallelism" grossly misstate the court's holding. Petitioners neglect the specific factual context of the lower court's findings and corresponding substantive holdings. The same defect impairs the Petition's arguments that the Court of Appeals has created a strict liability standard for product shortages. Petitioners wholly ignore the substantial factual record of their acts upon which the Court of Appeals relied. Therefore, in the context of the summary judgment proceeding at issue, there is no evidentiary basis for considering, let alone endorsing, petitioners' arguments about their Questions 2 and 3.

ARGUMENT

I. PETITIONERS DEMONSTRATE NO VALID GROUNDS FOR ISSUANCE OF THE WRIT

The only reason given in the Petition for the issuance of the writ are that the Court of Appeals decision supposedly conflicts with this Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574, regarding standards for the grant of summary judgment, and with certain "bedrock" antitrust principles. Petition at pp.11, 13. Although petitioners assert that no other circuit has reached the same conclusions as the Court of Appeals, they necessarily stop short of any suggestion that there is a conflict among the circuits. Petition at p.11. It would not be surprising if the Ninth Circuit's decision has not yet been duplicated in other circuits; the extensive factual record in this case is unique, and *Matsushita* is a relatively recent decision that the circuits are still fleshing out. Because an actual conflict

has not developed, there is no reason for this Court to intervene in the process.

In reality, as this Opposition explains in detail, the Court of Appeals' decision in no way conflicts with the decisions of this Court. On the subject of summary judgment, the Court of Appeals expressly reiterates and follows the *Matsushita* standard. With regard to the basic principles of antitrust law, the Court of Appeals makes no new law; petitioners merely assert that the supposed misapplication of the *Matsushita* standard makes it unreasonably easy for plaintiffs to win an antitrust case.

Although petitioners cloak their petition as an attack on an erroneous interpretation of *Matsushita*, their argument really is that they do not agree with the way that the Court of Appeals applied the *Matsushita* standard to the extensive factual record in this action that included both direct and circumstantial evidence. They would prefer to have this Court re-evaluate the entirety of this evidence and possibly come to a different conclusion.

Petitioners' arguments depend upon a serious misreading of the Court of Appeals' decision. Indeed, to a large extent, the Petition tries to direct this Court into adopting the District Court's reading of the facts, which is considerably at odds with that of the Court of Appeals. In effect, petitioners ask this Court to sift through the evidentiary record and decide which of the courts below did a better job of analyzing the facts. This is not an appropriate role for this Court on certiorari.

II. THE COURT OF APPEALS FOUND SUFFICIENT FACTS TO DENY SUMMARY JUDGMENT

In the Petition for Certiorari, petitioners rely principally upon quotations from the decision of the District Court to state the facts of the case, and then argue that the Court of Appeals decided the case wrongly on those facts. Since the Court of Appeals was required to review the summary judgment *de novo*, the District Court's factual findings are legally irrelevant. The issue presented on this Petition is whether the Court of Appeals correctly concluded that there are genuine issues of material fact and that petitioners are not entitled to judgment as a matter of law.

Petitioners' discussion of the background facts of this litigation predominantly, and erroneously, cites to the District Court's statement of facts, without stating that it is drawing the facts from the District Court rather than the Court of Appeals. Petition at pp.3-5. Thus, petitioners are arguing that the Court of Appeals' decision should be overturned on the basis of the factual findings in the District Court decision that the Court of Appeals reversed. Not surprisingly, the District Court's decision does not support the Court of Appeals' decision. The thrust of the Court of Appeals' decision is that the District Court ignored many of the facts, such as direct evidence of price-fixing communications, that defeat summary judgment.

The District Court's opinion makes at best a cursory survey of the weighty factual record in this case and concludes, almost without reference to the record, that the court cannot find evidence sufficient to defeat summary judgment. In contrast, the Court of Appeals made a more searching (although by no means complete) examination of the evidence to conclude that there are genuine issues of material fact to be decided at trial—although the court's effort is difficult if not impossible to discern from the Petition here. In their petition for rehearing before the Court of Appeals, petitioners did not question any of the Court of Appeals' determinations of the facts, and they should be bound by those determinations now. Nevertheless, petitioners are necessarily asking this Court to choose the District Court's interpretation of the facts over that of the Court of Appeals.

The basic facts upon which the Court of Appeals based its reversal of summary judgment are stated in its opinion. While the court's opinion necessarily summarizes the extensive evidentiary record with which respondents resisted summary judgment, it does explain the types of evidence that respondents presented.

The first subject addressed by the Court of Appeals was plaintiff's evidence of price-fixing. Through the late 1960s, petitioners had an established practice of having secret face-to-face meetings and telephone contacts with each other for the express purpose of verifying the prices each was charging. App. A at 33a-35a. Additionally, respondents presented direct evidence that petitioners coordinated their price moves through direct contacts

with unfranchised independent marketers. App. A at 45a-49a. After this Court's decision in *United States v. Container Corp.* (1969) 393 U.S. 333, which made such activities more hazardous, petitioners' direct contacts with each other diminished in frequency but did not stop altogether. App. A at 40a-45a. However, for the most part, petitioners consciously shifted to other means of communication to achieve the same purpose. In particular, they began to post the prices in public places so that they could view one another's prices, even though there was no business reason for such postings other than signaling one another. App. A at 31a-33a. Similarly, they publicized their price changes in the press, even though the only reason for doing so was to signal each other regarding price changes. App. A at 24a-30a. The result of all these activities was a curious "sawtooth" pattern of gasoline prices: repeatedly, prices would gradually decline over a period of several weeks, and then abruptly "restore" to the previous high price in a relatively short period of time. App. A at 16a-17a.

On the issue of a supply conspiracy, the evidence showed the following. In August of 1972, the cycling of gasoline prices stopped abruptly. App. A at 54a-55a. Before this date, several petitioners had noted that it was desirable to eliminate excess production but that this result would require the collusion of the others. App. A at 55a-56a. Throughout the period before August 1972, petitioners engaged in numerous direct contacts among themselves to share supposedly confidential supply data. App. A at 56a-58a. They then explicitly chose not to expand refinery capacity to meet rising demand. App. A at 58a-59a. On the foreign supply front, petitioners as members of foreign consortia met and explicitly discussed how they would limit the growth of crude oil supplies in the Middle East. App. A at 62a-63a.

The gist of petitioners' argument is that, through a supposedly erroneous reworking of the summary judgment standards laid down in *Matsushita Electric Industrial Co. v. Zenith Radio Corp., supra,* 475 U.S. 574, the Court of Appeals was able to reverse summary judgment on the basis of a minimal set of ambiguous facts. To the contrary, the Ninth Circuit carefully examined the factual record and found the clear implication that petitioners had

jointly fixed prices and restrained supply. Under the standards that this Court has enunciated for evaluating motions for summary judgment, the Court of Appeals was duty bound to allow a jury the opportunity to review these facts.

Few of these facts are discussed or even mentioned in the Petition for Certiorari. Instead, petitioners deceptively argue that the Court of Appeals defied summary judgment law by overturning summary judgment on the basis of minimal facts that are not highly suggestive of collusion. The Petition effectively ignores the explicitly factual basis for the Court of Appeals' reversal of summary judgment.

III

THE COURT OF APPEALS DID NOT ALTER THE *MATSUSHITA* STANDARD

Petitioners argue that the Court of Appeals altered the standards for the grant or denial of a summary judgment laid down in *Matsushita* and *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752. Thus, the Petition asserts that the Court of Appeals "relieved respondents of any obligation to present" evidence that tends to exclude the possibility that petitioners acted independently. Petition at p.15. This contention simply misstates the Court of Appeals' holding. In reality, the Court of Appeals expressly acknowledged the "tends to exclude" standard. App. A at 8a.[4] It then applied the standard and found that much,

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[4] Not content merely to misstate the Court of Appeals' ruling, petitioners also blatantly mischaracterize an article written by respondents' counsel. Petitioners quote a published article by two of the State of Arizona's counsel to the effect that the Court of Appeals wrote the "tends to exclude" standard out of the law in this case. Petition at p.12. Petitioners reach this conclusion through the clever use of ellipses to invert the meaning of the quoted passage. The full text of the cited portion of the article, with the omitted language emphasized, is as follows:

> "Decisions applying *Matsushita* and *Monsanto* in cases involving wholly ambiguous evidence have required plaintiffs to present evidence that 'tends to exclude' the possibility of innocent conduct by

(Footnote continued on next page)

although not all, of the evidence presented by respondents actually did "tend to exclude the possibility" of independent action.

After acknowledging the "tends to exclude" standard of *Matsushita* and *Monsanto*, and applying it, the Court of Appeals then considered the kinds of evidence plaintiffs are permitted to use in resisting antitrust summary judgment. Far from easing the burden of respondents in resisting summary judgment, as petitioners so strenuously argue, the Court of Appeals observed limits on the kinds of circumstantial evidence plaintiffs may use to argue that their evidence "tends to exclude the possibility of independent action." Indeed, the Court of Appeals precisely followed *Matsushita* and *Monsanto* in applying certain restrictions on the proof upon which the party resisting the motion may rely.

The first step of the *Matsushita* summary judgment analysis is for the moving party to make a showing of the absence of a genuine issue of material fact. *Matsushita*, 475 U.S. at 586, n.10. The Court of Appeals proceeded on the assumption that petitioners had met this burden. See, e.g., App. A at 18a.

The next step is that the party resisting the motion must come forward with specific facts, direct or circumstantial, to demonstrate that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 586-587. The inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion, but conduct as consistent with competition as with conspiracy does not, standing alone, support an inference of conspiracy. *Id.* at 587-

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the alleged conspirator. *Defendants seeking summary judgment frequently contend that this 'tends to exclude' standard allows a court in any case to grant summary judgment unless plaintiff can rebut the motion with a preponderance of the evidence.*

"Now, in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir.1990), *rehearing denied* (Jan. 8, 1991), the Ninth Circuit has rejected the notion that *Matsushita* and *Monsanto* created such an evidentiary burden for plaintiffs."

M. Spiegel & W. Liao, *Avoiding Summary Judgment After* Matsushita *and* Monsanto, 5 Antitrust 12 (Spring 1991).

588. Instead, a plaintiff resisting summary judgment in an antitrust case must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. *Id.* at 588. In other words, a plaintiff "must show that the inference of conspiracy is *reasonable* in light of the competing inferences of independent action or collusive action that could not have harmed" plaintiff. *Ibid.* (emphasis added).

The Court of Appeals scrupulously observed this standard. The court carefully examined plaintiffs' evidence to determine whether it tended to exclude the possibility of independent action. For example, the court considered plaintiffs' pricing pattern evidence and found that it was insufficient, standing alone, to establish an inference of price-fixing. App. A at 22a. Similarly, the court held that oil company logs indicating advance price knowledge were insufficient, standing alone, to support an inference of collusion under *Matsushita*. App. A at 44a. Nevertheless, the Court of Appeals reversed summary judgment because it also found additional evidence that, when considered with the evidence of parallel pricing and advance price knowledge, did tend to exclude the possibility that defendants had acted independently. That evidence included a long history of direct price communications aimed at raising or stabilizing prices (App. A at 33a-54a), price postings undertaken specifically to communicate prices to competitors in lieu of direct contacts, without any legitimate business purpose (App. A at 31a-33a), press releases issued for the same purpose (App. A at 24a-30a), direct evidence of communications with independent marketers to fix prices (App. A at 45a-54a), exchange of supply data in the face of an acknowledged interest in limiting supply (App. A at 55a-62a), and joint efforts to limit growth of Middle East production (App. A at 62a-65a). Given this additional evidence, the Court of Appeals properly concluded that plaintiffs had presented more than just neutral facts consistent with conspiracy. They had not, for example, rested on evidence showing only simple parallel pricing and an opportunity to conspire. They had presented direct and circumstantial evidence showing that the inference of conspiracy was reasonable in light of the competing inference of independent action. Plaintiffs had therefore met their fundamen-

tal burden in opposing summary judgment. App. A at 39a, 45a, 52a, 54a n.22, 61a and 65a.

However, having identified evidence that tends to exclude the possibility of independent action, the Court of Appeals did not conclude its analysis. Instead, the court held, citing *Monsanto* and *Matsushita*, that even a showing of evidence that tends to exclude the possibility of independent action may not be enough to defeat summary judgment. App. A at 11a-12a. According to the Court of Appeals, if the plaintiff introduces evidence that "tends to exclude" the possibility of independent action, summary judgment may nevertheless be appropriate if the inference that the plaintiff requests would deter significant procompetitive conduct. App. A at 11a.

The Court of Appeals summarized this standard as follows:

> "In summary, we conclude that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior. Once the defendant has made such a showing, the plaintiff must come forward with *other* evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully."

App. A at 13a-14a (emphasis added).

In other words, the Court of Appeals held that it may not be enough for antitrust plaintiffs to present sufficiently unambiguous evidence of collusion to defeat summary judgment. Because of the possible risks posed to the competitive marketplace, some types of evidence, standing alone, cannot be used to defeat summary judgment, even though they may tend to exclude the possibility of independent action.

The Court of Appeals found this restriction implicit in *Matsushita* and *Monsanto*. App. A at 11a-12a. Whether the Ninth Circuit was correct in this interpretation is not before this Court at this time, since respondents were able to meet the burden that the Court of Appeals had placed on them. Under any permissible

interpretation of *Matsushita*, respondents presented an evidentiary record more than adequate to defeat summary judgment.

No matter how much they try to finesse the issue, petitioners' real complaint about the Court of Appeals decision is that it does not give the trial court the power to weigh the inferences and choose the ones it thinks most likely. Thus, petitioners take umbrage with the following passages from the Court of Appeals decision:

> We do not take [the *Matsushita* test] as suggesting that a district court may grant summary judgment whenever the court concludes that inferences of conspiracy and innocent conduct are equally plausible.
>
> . . . . . .
>
> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct.

Petition at p.15, quoting App. A at pp.8a-9a, 10a.

The Court of Appeals' statements are clearly correct. They simply repeat the time-honored rule that the trial court is not empowered to weigh inferences in the place of the jury. To secure summary judgment, an antitrust defendant must do more than convince a court that there is evidence that is consistent with its point of view. It must convince the court that there is insufficient evidence that would make the inference of conspiracy reasonable in light of the competing inferences of independent action. *Matsushita*, 475 U.S. at 588.

Petitioners do not stop here, however. They go on to criticize the Court of Appeals for supposedly adopting the converse of the quoted statements, although it clearly did not do so. The Court of Appeals did not say that summary judgment must be denied whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct, as petitioners insist. Petition at p.16. Rather, the Court of Appeals noted that, by its very nature, circumstantial evidence is usually consistent

with competing sets of inferences (App. A at 10a), and it is not the role of the court to choose among them based on its own view of how the facts should be determined. App. A at 9a-10a. Rather, to defeat summary judgment, the antitrust plaintiff must present sufficiently unambiguous evidence, direct or circumstantial, that tends to exclude the possibility of independent action. App. A at 8a and 14a. Additionally, in meeting this burden plaintiff may not ask the court to draw an inference from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct. App. A at 11a.

The Ninth Circuit's interpretation of *Monsanto* and *Matsushita* as not allowing the court to weigh inferences in the place of the jury is surely correct. Once plaintiff has met its burden of introducing evidence that tends to exclude the possibility of independent action, it is to be expected that defendant might present a case that plausibly leads to the inference that it is innocent. If the trial court has the power to decide which inference is more plausible, there is no right of jury trial left. The summary judgment motion is the trial.

This conclusion does not contradict footnote 21 of *Matsushita*. Footnote 21 holds that no inference can be drawn from conduct that is merely consistent with conspiracy. 475 U.S. at 597 n.21. It does not suggest that, once an inference is permissibly drawn, the court can weigh it against competing inferences.

Monsanto itself illustrates this point. In *Monsanto*, after finding that plaintiff had introduced evidence that met the "tends to exclude" standard, this Court did not then attempt to weigh competing inferences:

> The choice between two reasonable interpretations of the evidence was properly left for the jury.

465 U.S. at 767 n.12.

> Monsanto's contrary evidence has force, but we agree with the courts below that it was insufficient to take the issue from the jury. . . . [W]e cannot say that the courts below erred in finding that Spray-Rite produced substantial evidence of the concerted action required by § 1 of the Sherman Act [15

> U.S.C. section 1], and that—despite the sharp conflict in evidence—the case properly was submitted to the jury.

Id. at 768 n.14.

In summary, petitioners' argument that the Court of Appeals has somehow undermined this Court's decisions in *Monsanto* and *Matsushita* plainly mischaracterizes the decision in the court below. Their real complaint is that they disagree with the Court of Appeals' assessment of the substantial evidentiary record in this action, a criticism that scarcely justifies a grant of certiorari.

IV. THE COURT OF APPEALS DID NOT ALLOW LIABILITY TO BE IMPOSED FOR "MERE CONSCIOUS PARALLELISM"

Petitioners protest vociferously that the Court of Appeals has allowed liability to be imposed for "mere conscious parallelism." Once again they have mischaracterized both the Court of Appeals' holding and the record in this case. Petition at p. 19.

The Court of Appeals quite clearly stated the rule of law that petitioners claim they want this court to establish:

> We recognize that such interdependent pricing may often produce economic consequences that are comparable to those of a classic cartel. Nonetheless, proof of such pricing, *standing alone*, is generally considered insufficient to establish a violation of the Sherman Act. . . . Additional proof beyond mere parallel pricing usually is required.

App. A at 22a (emphasis in original).[5]

Thus, petitioners' real complaint is not that the Court of Appeals made an incorrect rule of law, but rather that it misapplied the standard. Petitioners ask this Court to review again the factual record in this case to determine whether the Court of Appeals was correct in concluding that respondents produced

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[5] In an accompanying footnote, the Court of Appeal also observed: "In some cases, when a market is highly unconcentrated, parallel pricing alone may be all the proof that is required." App. A at 22a, n.9. This statement is pure dictum, and so could not be effectively reviewed by this Court on a grant of certiorari in this case.

sufficient additional evidence that, when considered with the pricing evidence, "tends to exclude" the possibility of independent action.

Petitioners assert that a unilateral decision to publish or announce prices is lawful. Petition at pp.23-24. While this naked assertion is unexceptionable, it has nothing to do with the facts of this case. Here, the Court of Appeals found a number of factors from which it would be reasonable for a jury to conclude that petitioners were not merely unilaterally announcing prices, but were colluding on prices—the precise issue the court is required to determine in considering summary judgment under *Matsushita*.

From the extensive factual record of this case, the Court of Appeals highlighted a number of facts that indicated that petitioners' pervasive price dissemination policies were something other than unilateral decisions to announce prices. The executives of the oil companies testified that their purpose in publishing tankwagon prices was to inform competitors quickly of a price move in the express hope that they would follow the move. App. A at 24a. Even more to the point, there was no purpose for the publication of these prices other than to facilitate interdependent or collusive pricing. *Id.* at 24a-25a, 29a. Similarly, petitioners publicly posted tankwagon prices in exceptional detail specifically for the purpose of alerting one another to price changes. *Id.* at 31a-33a. These practices were set against the background of a long history of secret face-to-face and telephone discussions of prices among petitioners undertaken for the express purpose for stabilizing prices. *Id.*at 33a-35a. Additionally, petitioners coordinated price moves through direct contacts with independent marketers. *Id.* at 45a-49a. The direct price contacts among petitioners continued at a reduced level after this Court's decision in *United States v. Container Corp.* (1969) 393 U.S. 333 (App. A at 40a-45a), but for the most part petitioners substituted the other price dissemination practices in a cynical attempt to tiptoe around *Container*. *Id.* at 35a-37a.

Thus, petitioners' price dissemination practices were more than simple unilateral price announcements. They were an extension of a comprehensive system of notifying one another of price changes

for the express purpose of stabilizing prices. Consequently, this evidence "tends to exclude" the possibility of independent action; it makes the inference of conspiracy reasonable in light of the competing inference of innocent conduct.

In short, the Court of Appeals did not endorse the imposition of liability for mere conscious parallelism. What petitioners really ask this Court to do is to sift through the evidence again and come to a different conclusion about its significance.

V. THE COURT OF APPEALS DID NOT CREATE A STRICT LIABILITY STANDARD FOR PRODUCT SHORTAGES

Petitioners again mischaracterize both the decision of the Court of Appeals and the record in this case, when they suggest that the court introduced a strict liability standard for product shortages. Petition at p. 25. To the contrary, the Court of Appeals considered the substantial factual record in detail, and determined that there was indeed evidence that, in the context of the specific industry being considered, did "tend to exclude" the possibility of independent action. In reality, petitioners want this Court to second-guess the Court of Appeals' assessment of the evidence.

Specifically, the Court of Appeals found the following. In August 1972, price cycles abruptly ended, with prices remaining at their former high level and then steadily climbing. App. A at 54a. Before that time, a number of petitioners noted internally not only that supply restrictions were needed to stabilize prices, but that such restrictions required joint action by petitioners. *Id.* at 55a-56a. Throughout the period up to the cessation of the price cycling, petitioners exchanged detailed internal supply information, often through direct personal contacts. *Id.* at 56a-58a. In particular, in the month in which price cycling ceased, petitioner Exxon surveyed a large number of oil companies to determine their crude oil supply situation. *Id.* at 57a. Finally, in the context of foreign production consortia, a number of petitioners quite blatantly discussed proposals to reduce the production of foreign crude oil. *Id.* at 62a-64a.

However, contrary to petitioners' characterization, the Court of Appeals did not suggest that these facts, standing alone, necessa-

rily led to the conclusion that petitioners had conspired to reduce supply. Rather, it held that in the context of this particular market, in light of its specific characteristics making independent supply reduction decisions unlikely, these facts could reasonably lead a jury to conclude that petitioners agreed to exchange supply and demand information to facilitate a mutual slowing of increases in supply capacity. *Id.* at 60a-61a.

Petitioners are therefore not asking this Court to resolve any pressing issues of law. Instead, they are merely asking this Court to review the Court of Appeals' assessment of the evidence and come to a different conclusion. This is not the proper function of certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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